No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF INDEPENDENT VOTERS OF ILLINOIS-INDEPENDENT PRECINCT ORGANIZATION, COMMON CAUSE/ILLINOIS, BETTER GOVERNMENT ASSOCIATION AND MICHAEL L. SHAKMAN, AMICI CURIAE

C. RICHARD JOHNSON
7300 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Counsel of Record
for Amici Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Independent Voters of Illinois-Independent Precinct Organization, Common Cause/Illinois, Better Government Association and Michael L. Shakman respectfully move for leave to file the accompanying Brief *Amici Curiae* in this case. Written consent to the filing of the Brief has been obtained from the petitioners and from respondent State officials, including the Governor of the State of Illinois. The Republican Party of Illinois and its officials have, however, declined to consent. The Brief *Amici Curiae* supports the position of the petitioners and is filed within the time allowed for the filing of petitioners' Brief.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office both in party primary and general elections. Common Cause/

Illinois is the Illinois branch of Common Cause, a national non-partisan citizens' organization. Common Cause/Illinois is active in seeking to obtain a free, fair and competitive electoral process in Illinois. Better Government Association is a citizens' organization which promotes efficiency in governmental services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and a member of Independent Voters of Illinois-Precinct Organization. He has been a candidate for public office.

Each of the *amici* has an interest in maintaining a free, fair electoral system. They also have an interest in maintaining freedom of political association; this is especially the case for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

In this case, the Court of Appeals for the Seventh Circuit has held that virtually every term and aspect of public employment, other than discharge, including hiring, salaries, promotions, demotions, transfers and the like, can all constitutionally be conditioned on support of an officially favored political party. This is held to be the case not just for policy-making employees, but for all government workers.

Amici are concerned that such a governmental employment system, by which important terms of employment are conditioned on support of a favored political organization, is inconsistent with their interests in maintaining freedom of political association. As was recognized in *Elrod v. Burns*, 427 U.S. 347, 356 (1976):

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, *as well as the multitude seeking jobs.*

Id. at 356 [emphasis supplied].

Amici are also concerned that the effect of a politically conditioned employment system, such as the one in the present case, is inconsistent with their interests in a free and fair political process. Indeed, the whole point of such an employment system is for the coercive power of the state to be used to provide an electoral advantage for a favored political organization. As the Court noted in *Branti v. Finkel*, 445 U.S. 507 (1980):

> [A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process.

Id. at 513-14 n.8.

Petitioners' Brief is expected, understandably, to present the case from the point of view of the serious impact which a politically conditioned employment system has on the rights of public employees and job applicants to freedom of speech and political association under the first amendment. The proposed Brief *Amici Curiae*, on the other hand, discusses the serious impact which such a system has on the rights of voters to a free and fair electoral system. This is a point on which petitioners' Brief is not expected to focus.

Respectfully submitted,

C. RICHARD JOHNSON
7300 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Counsel of Record for Amici Curiae Independent Voters of Illinois-Independent Precinct Organization, Common Cause/Illinois, Better Government Association and Michael L. Shakman

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INTERESTS OF THE AMICI

This case concerns the constitutionality of a system by which important terms and aspects of state employment, other than discharge, are conditioned on support of an officially favored political party. *Amici* are concerned with

the harmful and unconstitutional effects such a politically conditioned employment system has on the functioning of the democratic political process, both by impairing the rights of the public to freedom of political association and in distorting the electoral process.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Common Cause/Illinois is the Illinois branch of Common Cause, a national non-partisan citizens organization which seeks to promote a fair electoral system. Common Cause/Illinois is active in seeking to obtain a free, fair and competitive electoral process in Illinois. Better Government Association is a citizens' organization which promotes efficiency in government services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and member of Independent Voters of Illinois-Independent Precinct Organization who has been a candidate for public office.

Each of the *amici* has an interest in promoting a free and fair electoral system. Each also has an interest in maintaining freedom of political association; this is especially so for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

STATEMENT OF THE CASE

The case is before the Court on a limited factual record, the District Court having dismissed the complaint. Thus, for purposes of this review, the complaint must be taken as true. Unless it would appear to a certainty that plaintiffs could not prevail under any state of facts that could be proved at a trial in support of their claims, the decision of the Court of Appeals denying or restricting those claims must be reversed. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

The complaint alleges that the State of Illinois operates an employment system for State jobs by which important employment decisions are conditioned on political support of the Republican Party. Complaint, par. 11k, R.A. 8. Persons who do not have the political support of the Republican Party are excluded from being hired for State jobs. Complaint, par. 10a, R.A. 6. Existing State employees similarly are prevented from receiving promotions and related raises or favorable job transfers, which they otherwise would receive, if they do not have the partisan support of the Republican Party officials. Complaint, pars. 7a, 8a, R.A. 4-5. And employees who are laid off from State jobs are prevented from being switched to other positions or being called back to work when the layoff ends, if they do not obtain Republican Party sponsorship. Complaint, par. 9a, R.A. 5.

Republican Party political support in turn depends on the job applicants' or employees' voting records (whether they vote in Republican Party primary elections)[1], on their

[1] Under Illinois law, a recorded party declaration is required to vote in party primary elections. Ill. Rev. Stat., ch. 46, §7-44 (1987).

making financial campaign contributions to the Party and on their doing or promising to do campaign work for the Party and its candidates for public office. Complaint, par. 11h, R.A. 7. People who support other political groups, or who vote in other party primary elections, are excluded from receiving the political support needed to be hired or otherwise favorably considered for State job decisions. Complaint, par. 11k, R.A. 8.

Plaintiffs are individuals who were not supporters of the Republican Party. Complaint, pars. 19a-23e, R.A. 13-17. For that reason, under the State's employment system they were prevented from being hired for a State job or, if they already had such a job, they were denied promotions, raises, important job transfers, or continued employment after a layoff, in each case which they otherwise would have obtained. Complaint, par. 11k, R.A. 8.

Plaintiff James Moore is prevented from being hired by the State as a prison worker; Cynthia Rutan, a rehabilitation counselor with the State's Department of Rehabilitation Services, is prevented from receiving a promotion (and an accompanying raise); Franklin Taylor, a State road worker, is prevented from receiving a promotion and raise or having an available transfer to his home county approved; and Richard Standefer, a garage worker, and Dan O'Brien, a kitchen worker in the State's Department of Mental Health and Development Disabilities, were prevented from being assigned to other jobs or called back to work when laid off, unlike other workers; all because they did not have the support of the Republican Party or had made the mistake of voting in a Democratic Party primary. Complaint, pars. 19a-23e, R.A. 13-17. Mr. O'Brien eventually was rehired after he made the necessary arrangements to obtain Republican Party sponsorship. Complaint, par. 22g, R.A. 16.

All of the jobs in question, except the job of Mr. Standefer, are covered by the State's Personnel Code[2]—that is, they are nominally civil service jobs.

This politically conditioned hiring system is implemented through a formal Executive Order of the Governor which prohibits employment decisions involving hiring, promotions, transfers and reemployment from being made without the approval of his patronage office. Complaint, pars. 11-11k, R.A. 6-8. The complaint alleges that this system applies to the many thousands of jobs in the executive branch of the government of the State of Illinois for which employment decisions are made each year. Complaint, pars. 11a-11b, R.A. 6.

The complaint alleges that the "purpose and effect" of this politically coercive employment system is to provide the Republican Party and its candidates with political campaign assistance, and to discourage people from opposing the Governor and the Republican Party in elections. This is alleged to create a significant political effort for that officially favored political party and against any other political groups. Complaint, par. 11k, R.A. 8.

The complaint alleges that this system violates the first amendment rights of plaintiffs to freedom of speech and political association. Complaint, par. 24g, R.A. 19.

The United States District Court of the Central District of Illinois dismissed the complaint on the ground that it failed to state a claim upon which relief could be based.

On appeal, the Court of Appeals for the Seventh Circuit held that the Constitution does not bar the State from conditioning employment decisions—hiring, salaries, promo-

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[2] Ill. Rev. Stat., ch. 127, § 63b101 *et seq.* (1987).

tion or demotion—on political affiliation, unless the action amounts to a discharge. Thus, it affirmed the dismissal of Mr. Moore's claim that he was prevented from being hired for political reasons. As to other plaintiffs, it remanded their claims to determine if the adverse job decision amounted to a discharge, holding that any disadvantage short of actual or constructive discharge was not actionable.

SUMMARY OF THE ARGUMENT

This Court has long held that important public benefits, including public employment, cannot be conditioned on a basis which infringes constitutionally protected interests such as freedom of speech and association. *Perry v. Sindermann*, 408 U.S. 593 (1972). Official pressure on employees to support political candidates not of their own choice constitutes coercion of belief in violation of the Constitution. *Connick v. Myers*, 461 U.S. 142 (1983).

The decision of the Court of Appeals, which would limit constitutional protection to instances in which there is a political discharge but would allow other important terms of employment to be politically conditioned, is contrary to this long-established precedent. Moreover, the distinction drawn by the Court of Appeals is inconsistent with reality. Jobs are important to people. Where important terms of employment are politically conditioned, those who would have public employment face a serious impairment of their freedom of speech and association. The decision would subject public employees to political coercion, undermining the decisions of this Court in *Branti v. Finkel*, 445

U.S. 507 (1980), and *Connick v. Myers*, 461 U.S. 142 (1983).

Where important job decisions are conditioned on support of a favored political party, the public's rights to a free and fair political and electoral process are denied. Such a system stifles political competition. And it unconstitutionally tilts the electoral scales for the favored political organization, denying opposing voters and candidates an equal voice and choice. The impact of so conditioning public jobs is especially severe on racial minorities who are given a Hobson's choice between employment and political liberty.

Only a very compelling state interest could justify the conditioning of hiring and other employment decisions on political affiliation. No state interest, compelling or otherwise justifies the massive political employment system described in the complaint. *Branti v. Finkel*, 445 U.S. 507 (1980). Political affiliation and financial contributions are wholly irrelevant to fitness for the jobs in question. A politically conditioned employment system inhibits the free functioning of democracy, rather than advancing it, since it seeks to assist only a single favored political party and to dissuade other political activity. Employment decisions which are conditioned on restrictions on speech and association are not exempt from constitutional inquiry.

ARGUMENT

I.

FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES AND APPLICANTS ARE SERIOUSLY IMPAIRED WHEN IMPORTANT TERMS OF EMPLOYMENT SUCH AS HIRING, SALARY LEVELS AND PROMOTIONS ARE CONDITIONED ON SUPPORT OF AN OFFICIALLY FAVORED POLITICAL PARTY.

This Court has long held that important public benefits, including public employment, cannot be denied on a basis which infringes constitutionally protected interests—such as freedom of speech and association. As Mr. Justice Stewart wrote for a unanimous Court in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> . . . most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100; *Wieman v. Updegraff*, 344 U.S. 183, 192; *Shelton v. Tucker*, 364 U.S. 479, 485-486; *Torcaso v. Watkins*, 367 U.S. 488, 495-496; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288; *Baggett v. Bullitt*, 377 U.S. 360; *Elfbrandt v. Russell*, 384 U.S. 11, 17; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606; *Whitehill v. Elkins*, 389 U.S. 54; *United States v. Robel*, 389 U.S. 258; *Pickering v. Board of Education*, 391 U.S. 563, 568.

408 U.S. at 597.

This constitutional protection of public employment is important to preserve society's interest in robust debate and vigorous political competition. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

Thus, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held it to be unconstitutional to discharge public employees for supporting the wrong political party. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held that the state could not fire employees to facilitate the political hiring of their replacements. And as Mr. Justice White noted more recently in *Connick v. Myers*, 461 U.S. 138 (1983), (citing *Elrod* and *Branti*),

> We have recently noted that *official pressure* upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights.

461 U.S. at 149 (emphasis supplied).

Notwithstanding this long line of authority barring the conditioning of public benefits on restraints of freedom of speech and association, the decision of the Court of Appeals in the present case would apply constitutional protection only to political firings. It would allow the state to maintain an extensive system by which other important terms of public employment—hiring, promotion, salary and job discipline—can be expressly conditioned on the most serious imaginable limitations on first amendment rights,

restrictions on how one can vote, with which party one can affiliate, and to whom political financial contributions may be given. Under the decision of the Court of Appeals, this would be the case no matter how extensive such a system is, what political conditions are imposed or what effect it has on the electoral process.

This restriction which the Court of Appeals would place on the constitutional rights of those who would be public employees is plainly inconsistent with the precedents of this Court. It would severely impair rights of speech and association. And it would undermine completely this Court's holdings in *Branti* and *Connick* that public employees are constitutionally protected from political coercion.

A. The Decision Of The Court of Appeals Is Inconsistent With Well-Established Authority.

The holding of the Court of Appeals which would prohibit only political firings but allow other terms of public employment—hiring, promotion, salary levels, transfers, job discipline—to be politically conditioned is contrary to long-standing precedents of this Court. Forty years ago, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court stated that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.' " Significantly, the reference was to appointment, not removal. *Id.* at 100.

This same language was quoted by the Court in *Weiman v. Updegraff*, 344 U.S. 183 (1952), in emphasizing that the rights of those who would be state employees to freedom of political affiliation were entitled to constitutional protection against an overbroad loyalty oath. The reference again was to appointment. This quotation is cited in both *Elrod*, 427 U.S. at 357, and *Branti*, 445 U.S. at 515 n.10.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court held that it was unconstitutional to bar members of "subversive" organizations from being *hired* for or retained in state employment. Hiring was forbidden from being conditioned on political views. Similarly, in numerous "loyalty oath" cases this Court has held it to be unconstitutional to condition *obtaining* public employment on political affiliation. *See, e.g., Whitehill v. Elkins*, 389 U.S. 54 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964). *See also Torasco v. Watkins*, 367 U.S. 488 (1961), in which a religious test for *obtaining* a governmental position was held unconstitutional.

Nowhere in the case law is there any suggestion that the Constitution allows the state to condition hiring and other terms of public employment on restrictions of rights of speech or association. To the contrary, such a constrained reading of the Constitution is directly contrary to long-established law.

B. Conditioning Important Terms Of Employment On Political Affiliation Materially Impairs First Amendment Rights.

The decision of the Court of Appeals would draw a constitutional distinction between conditioning continued employment on political affiliation and similarly conditioning hiring, salaries and other terms of employment. This distinction is, however, inconsistent not only with the long-standing case law, but with the basic nature of reality.

Jobs are important to people. Not only are they a livelihood, significant as that is, they provide a central element of self-worth. Conditioning job opportunities and

career advancement on politics accordingly is one of the most effective ways by which the state can chill rights of political speech and association.[3]

It is not necessary to decide which is worse, to be let go for supporting the wrong party, or to be excluded from employment opportunities with the government altogether, or to have one's earnings reduced or a career put on hold, all for not paying money to the right party.[4] Each of these is a very serious impairment of basic constitutional rights.

Freedom of political association is inconsistent with the conditioning of any important terms of one's employment on political affiliation. If you are denied the opportunity even to be considered for a job for which you are well qualified simply because you do not contribute money to a particular party committee, you do not have freedom of political association in a material way. If your salary level depends on your continued support of a favored political organization, it is a fiction to say you have freedom of political association. If you can be demoted, or if you can be denied a promotion that you have earned, solely because of your political affiliation, you do not have freedom of political association.

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[3] This is illustrated by the fascinating report that when it became clear in Hungary that Communist Party membership was no longer a condition of job advancement, enrollment in the Party dropped precipitously. New York Times, November 4, 1989, at 5 col. 1.

[4] Of course, it all depends on a particular case. It may be more damaging to be denied opportunity for a good job in the first place for voting wrong than to have one's continued employment in some other job depend on political payments. Indeed for some, such as Ms. Rutan, there is no relevant employer other than the State. It is effectively the only employer of rehabilitation counselors. For constitutional purposes, the emphasis must be on the effect of the system on freedom of speech and association.

It does not take a firing to infringe the First Amendment rights of employees or applicants. Whenever sufficiently important terms of employment are based on political affiliation, rights of speech and association are impaired. This is plainly the result of the public employment system described in the complaint. Indeed, there is no valid constitutional distinction between conditioning continued public employment on political affiliation and so conditioning other important job decisions.

The decision of the Court of Appeals would seriously impair the rights of public employees and applicants to freedom of speech and association. As such, it is inconsistent with society's interest in robust debate and vigorous political competition, which is at the core of democratic values.

C. The Decision Of The Court Of Appeals Would Permit Public Employees To Be Subject To Political Coercion.

The decision of the Seventh Circuit would, moreover, severely undercut the holdings of *Branti* and *Connick* that public employees may not be coerced through control over their employment into support of a favored political party. Where an employee's salary level, or her ability to get a promotion, or his potential of being demoted, rests on his or her political support (money and work) of an officially favored party, the employee is plainly subject to political coercion, barred by *Branti* and *Connick*. A regime as would be allowed by the decision of the Court of Appeals would reindenture public employees to political masters.

As this Court has often repeated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . .

Board of Education v. Barnette, 319 U.S. 624, 642 (1943). The decision of the Court of Appeals would seek to reconfigure our constitutional constellation by providing that the state can indeed compel political affiliation by an entire system of conditioning jobs, promotions and salaries on support of a single party.

II.

A POLITICALLY CONDITIONED EMPLOYMENT SYSTEM IMPAIRS THE RIGHTS OF THE PUBLIC TO A FREE AND FAIR POLITICAL SYSTEM.

Where public jobs are conditioned on support of an officially favored political party, it is not only the constitutional rights of employees and applicants which are abridged. Such a system also severely impairs the free competition of both ideas and political parties and the conduct of fair elections which are of the essence of our democratic political system. This occurs in several ways.

A. Support Of Competing Political Interest Is Dissuaded.

The rights of the public to freedom of association are impaired by a politically conditional employment system. Conditioning jobs on support of one political organization necessarily injures the ability of competing political groups and their members to attract support, both among existing public employees and among those who wish to keep open the possibility of seeking employment. Where, as here, the political employment system is extensive, involving many thousands of jobs, the impact on the public's freedom of association is significant. Many, perhaps most, people will avoid openly supporting competing political groups if it means a significant disadvantage to their careers or a loss of employment opportunity.

This impact in terms of deterring support of competing political groups was clearly recognized by the plurality opinion in *Elrod v. Burns*.

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, *as well as the multitude seeking jobs.*
>
> . . . .
>
> . . . [P]atronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied).

These observations are relevant whenever significant terms of employment are politically conditioned. Indeed, here the complaint specifically alleges that "the purpose and effect" of the politically conditioned employment system is "to discourage opposition to the Governor and the Republican Party in elections." Complaint, par. 11k, R.A. 8. This effect occurs whenever significant terms of public employment are so conditioned, not just when there are political discharges. Jobs are sufficiently important that actions such as denying an opportunity to be hired or to be promoted, or providing lower income levels, all for political reasons, are entirely adequate to chill the free exercise of political choice.

B. The System Is Designed To Tip The Political Scales.

A politically conditioned employment system is also inconsistent with the interests of voters to a free and fair electoral process. The effect of such a system is to use the coercive power of the state to produce money and support for the favored political organization as a price for favorable job decisions. Where, as here, such practices are extensive, they operate to tilt the electoral scales by

providing electioneering support solely for a state-favored party. Here the complaint specifically alleges that the system is designed to create a "significant political effort" in favor of officially favored candidates and against their challengers. This is the point of the system—to give the favored party and its candidates an electoral advantage. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. . . . Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant. . . .
>
> . . . Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369. This point was also recognized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

It must be emphasized that the impact of a political employment system on the political system is not merely some theoretical concern. The purpose and the effect of patronage employment in Illinois is to tilt the political scales in favor of the party controlling the jobs. This is a central fact of political life in Illinois. And it operates by conditioning job openings and advancement on party support. It is not necessary to threaten discharge to produce a political effort. Where important job conditions depend on party support, employees and applicants do what they have to do.

This system seriously undermines the whole democratic process, chilling support for competing political organizations and using coercive state power to give a discriminatory advantage to a favored political group. Such a system is inconsistent with our basic concepts of democracy.

The Constitution does not permit the state explicitly to utilize its power to aid only a single favored political party. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld federal funding for presidential campaign expenses. It focused special attention, however, on the issue of whether the provisions of the law unfairly discriminated between candidates or parties. A statute providing for state funding solely for an officially favored political party would be patently unconstitutional under *Buckley*. Similarly, the scheme here, which is designed to advantage a single favored party through the state's coercive power over public jobs, is constitutionally infirm. Indeed, it may be regarded as a central tenet of the Constitution that there can be no officially favored political party. Such a concept belongs to totalitarian regimes, not democracy.

C. Political Rights Of Minorities Are Particularly Infringed.

The conditioning of public jobs on partisan political service violates the rights of all citizens to a free and fair political system. The impact of such practices is, however, especially severe on racial minorities. Their opportunity for employment is often more limited. So the possibility of a public job is a correspondingly more important interest.

To require such citizens as a price of getting a public job or a raise to pledge loyalty to political interests which they might not otherwise support is particularly harsh. It is a form of political serfdom, in which the price of a job is nothing less than the loss of political freedom.

Moreover, political affiliation in many areas correlates strongly to race. To allow jobs to be conditioned on political party affiliation is, in reality, often effectively the same as to allow it to be based on race.

III.

NO STATE INTERESTS ARE SERVED BY CONDITIONING STATE JOBS ON SUPPORT OF AN OFFICIALLY FAVORED POLITICAL PARTY.

Only a compelling state interest can justify State activities which burden fundamental rights, or which utilize suspect classifications. Even then the state must act in a way which minimizes the constitutional burden or injury. *Carey v. Brown*, 447 U.S. 455, 464-65 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

Here fundamental rights are burdened, *and* a suspect classification is utilized. Conditioning important aspects of public employment on support of a single favored political organization admittedly burdens the rights of employees and applicants to freedom of speech and political association. These are fundamental rights indeed. *Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, a political employment system expressly utilizes a classification for job decisions—party affiliation—which is based on the content of political speech. This is an inherently suspect classification, and is appropriately subject to the most exacting scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981).

In weighing suggested justifications for the political conditioning of public employment, this Court has been quite rigorous. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held:

> '[U]nless the government can demonstrate an overriding interest,' . . . 'of vital importance,' requiring that a person's private beliefs conform to those of the *hiring* authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

445 at 515-16 (citations omitted, emphasis supplied).

Given the extensive impact which the massive, politically conditioned hiring system in issue here has on freedom of speech and political association, only a very compelling state interest could justify such a system. In fact, however, *no* legitimate state interest, compelling or otherwise, justifies a system by which hiring and other job decisions are conditioned on politics.

A. Political Affiliation Is Unrelated To Fitness For The Jobs In Issue.

Political affiliation has, needless to say, no bearing on fitness for the specific jobs in issue in this case. Party affiliation is completely irrelevant to Ms. Rutan's service as a rehabilitation counselor, or to Mr. Moore's qualifications to be a prison guard or to Mr. Taylor's job of operating road equipment. To the contrary, to the extent that political criteria are, as here, substituted for experience and qualification, the result is inefficiency in governmental service. Not only are less qualified persons hired and promoted, the whole concept of building a career in public service is undermined. Where political party affiliation and financial contributions are the keys to getting a job or being promoted, the quality of public service is diminished, not enhanced.

This Court has explicitly rejected the notion that any interest in governmental efficiency justifies conditioning hiring for public jobs on political affiliation. In *Branti v. Finkel*, the Court held that, except for certain exempt positions, the interest in maintaining governmental effec-

tiveness and efficiency is not sufficient to justify political employment practices. Indeed, the Court observed that it is the interests of a political party, as opposed to governmental interests, that are served "to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party." *Id.* at 517, n.12.

Branti specifically dealt with the issue of possible state interests said to justify politically conditioned *hiring*. Mr. Justice Stevens, writing for the Court, stated:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation.
>
> '. . . . By what rationale can it even be suggested that it is legitimate to consider, *in the selection process*, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).'

Id. at 520 n.14. (emphasis added).

This rejection of a compelling state interest for political hiring was not simply an unnoticed footnote. Mr. Justice Powell, in his dissent, explicitly noted this passage as indicating that the thrust of the Court's decision was that there is no constitutional distinction between hiring and firing in terms of justifying state interests:

> The Court purports to limit the issue in this case to the dismissal of public employees. Yet the Court also states that '*it is difficult to formulate any justification for tying either the selection* or retention of an assistant public defender to his party affiliation.'

Id. at 522 n.2. (Citations omitted; emphasis added.) Mr. Justice Powell repeatedly described the case as one involving patronage hiring and retention. Thus he stated, in the first paragraph of his dissent that:

> [T]he Court further limits the relevance of political affiliation to *the selection* and retention of public employees.

Id. at 521 (emphasis added).

Branti was, of course, a case involving hiring. The discharges at issue were occasioned solely to facilitate the hiring of politically favored individuals. Thus the purported justifications focused not on the desire to fire politically, but on the desire to hire based on political considerations. As such, the decision in *Branti* is, it is submitted, conclusive of the issue of justifying state interests for political hiring.

B. A Politically Conditioned Employment System Inhibits Democracy Rather Than Advancing It.

The decision of the Court of Appeals suggests, albeit without analysis, that a politically conditioned employment system serves a state interest in promoting democracy—acting as an inducement to campaign activity.[5] This is the same justification for patronage hiring which was suggested by Justice Powell in his dissent in *Branti*, but which was rejected by the Court.

There is no reason to think that this justification is more compelling with respect to conditioning hiring and salaries on political support than it is for conditioning continued employment. In both cases the effect is to impair rights

[5] No justification at all would seem to be able to be presented for conditioning jobs on an applicant's voting record.

of speech and association, to strengthen a single party and to burden political competition.

Amici submit that the politically conditioned employment system involved here inhibits democracy rather than advancing it. Our democratic system does not consist of a single officially favored political party. To the contrary, our democracy depends on political competition, on a robust and vigorous marketplace of ideas in the political realm. This is, of course, why freedom of speech and political association are so central to our constitutional structure.

Where the state, however, seeks to promote a single party's fortunes, and to use its coercive power over employment to inhibit the activities of competing groups, democracy is weakened not strengthened. The free competition of political ideas is impaired if the state can withhold important public benefits from those who support the wrong party.

It is not a proper state interest to stimulate political activity on behalf of a single incumbent political faction and to retard it for other political groups. This does not "strengthen parties". It strengthens a single party. It does not promote campaigning. It reduces political competition. Campaign activity is not stimulated when political competition is burdened by the loss of important public benefits. In short,

> "while the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."

Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972, Stevens, J.), *cert. denied*, 410 U.S. 928 (1973).

Whatever might be asserted to be the state interest in conditioning jobs on political affiliation and activity generally, those interests are inapplicable to the present case. The jobs in question here are all civil service jobs. Significantly, Illinois has declared its state policy to be that for these jobs, decisions are to be based on merit and not politics. Ill. Rev. Stat., ch. 127, § 63b101 *et seq.* (1987). The employment system in issue here is inconsistent with the public policy of the State of Illinois. There can be no legitimate state interest in acting contrary to the legislatively declared state policy.

C. A Political Employment System Does Not Minimize Burdens On The First Amendment.

Any interest of the state in promoting democracy by stimulating political campaign activity must be accomplished in a way which minimizes any burden on fundamental rights. To the extent public employment is conditioned on political affiliation, it can hardly be said that burdens on the first amendment rights of employees and job applicants are minimized. The state has many available methods to promote vigorous campaign activities and political competition without impairing the first amendment rights of its employees. It can finance campaign costs, or provide a forum for political discussion or even provide special opportunities for employees to participate in campaign activities. But when it does so it must act in a way which is neither coercive nor discriminatory. *Buckley v. Valeo*, 424 U.S. 1 (1976).

There is, in any event, no necessity to burden the rights of employees and applicants in order to promote electioneering. Vigorous political competition thrives in numerous jurisdictions where jobs are not conditioned on political

support. And political employment systems are often associated with the lack of effective political competition.

D. Government Employment Decisions Are Not Exempt From Constitutional Inquiry.

The Court of Appeals also concluded that even though a politically conditioned employment system may indeed impair first amendment rights, it would be too intrusive to state or local governments to do anything about it.

This conclusion both dramatically devalues the first amendment and overstates the practical difficulties of fashioning relief. Given the importance which the rights of speech and association have under our constitutional system, federal courts can hardly simply take a pass just because it is a state or local government's employment practices which are in issue. This Court has for many years held that employment decisions of states and local government are subject to constitutional scrutiny, whether they involve hiring or firing. See, e.g., *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). To place such decisions off limits to constitutional scrutiny would be to cut a huge hole in the Bill of Rights.

This case itself, moreover, demonstrates that the constitutional rights of public employees can well be protected without intruding upon the proper domain of state government. The practices in issue here are not some underground system; they are adopted through a formal Executive Order of the Governor and implemented by an official office under the Governor. If this Court confirms that such an employment system is inconsistent with the Constitution, non-intrusive relief can be readily fashioned, leaving the State free to adopt any employment system it

wants, so long as it is not based on unconstitutional conduct. It may, indeed, be expected that governmental officials generally obey the law where the law is clearly stated. It is, of course, no harder to exclude political conditions from public employment than any other unconstitutional condition—religion, race or sex.

In fact, it may be the case that the "constructive discharge" distinction adopted by the decision of the Court of Appeals would be more intrusive than simply recognizing that conditioning important job decisions on politics is unconstitutional. Under the distinction set forth by Judge Manion, a court would have to explore not only whether political considerations were the basis of employment decisions, but whether those decisions were tantamount to discharge—a case by case exploration that would require vastly more inquiry as to government decisions than simply reviewing whether there is a politically conditioned employment system. And by not providing clear guidance to public officials, such a distinction would serve to promote the coercion of employees, not inhibit it.

The present case concerns an entire system of conditioning routine jobs on politics so as to tilt the political scales. No state interest justifies such a system. No intrusion into governmental affairs is required to recognize that such a system is contrary to basic constitutional principles.

CONCLUSION

The decision of the Court of Appeals, to the extent that it holds that terms or aspects of State employment may be conditioned on political support of a favored party, should be reversed.

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Respectfully submitted,

C. RICHARD JOHNSON
7300 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Counsel of Record
for Amici Curiae